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January 28, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Ms. Salas:

Enclosed please find two copies of the ex parte presentation delivered by the Coalition of Utah Independent Service Providers and the United States Internet Service Providers Alliance to the FCC's Common Carrier Bureau on Thursday, January 27, 2000, in the matter of the Request for Extension of the Sunset Date of the Structural, Non-Discrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, Inter-LATA Information Services (CC Docket No. 96-149).

Sincerely,



Sue Ashdown
Executive Director, Coalition of Utah Independent ISPs
Acting Executive Director, United States Internet Service Providers Alliance

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Before the
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-149

In the Matter of

Request for Extension of the Sunset Date of the
Structural, Non-Discrimination, and Other
Behavioral Safeguards Governing Bell Operating
Company Provision of In-Region, Inter-LATA
Information Services

**SUMMARY OF EX PARTE PRESENTATION OF THE UNITED STATES INTERNET
SERVICE PROVIDERS ALLIANCE AND THE COALITION OF
UTAH INDEPENDENT INTERNET SERVICE PROVIDERS**

The United States Internet Service Providers Alliance ("USISPA") and the Coalition for Utah Independent Internet Service Providers ("CUIISP"), pursuant to the provision at 47 C.F.R. § 1.1206, submit this ex parte presentation in support of the request of the Commercial Internet eXchange ("CIX") and the Information Technology Association of America ("ITAA"). Petitioners have requested that the Commission extend for at least two years the sunset date for structural separation pursuant to 47 U.S.C. § 272(f)(2) for Bell Operating Company provision of in-region, inter-LATA information services.

STATEMENT OF INTEREST

The USISPA is a group of Internet Service Provider ("ISP") trade associations and independent ISPs who have a common interest in advancing their ability to deliver information services to their customers and members. CUIISP is a Utah non-profit trade association consisting of independent Internet Service Providers offering service in Utah. With a few

exceptions, the members of USISPA and CUIISP are generally not competitive local exchange carriers, and they offer products and services that are distinct from local exchange service, but that are dependent on interconnection with local exchange carriers. The collective comments of these ISP trade associations and independent ISPs have not yet been heard in this docket.

DISCUSSION

I. CONGRESS HAD SOUND COMPETITIVE REASONS FOR IMPOSING STRUCTURAL SAFEGUARDS IN SECTION 272.

The Telecommunications Act of 1996 (the "Act") seeks to open telephone markets to competition by replacing the previous prevailing regulatory regimes with open markets. In the four years since its enactment, only one Bell company has met the requirements of Section 271 indicating that it has taken sufficient steps to facilitate local competition. It follows that the Bell companies continue to possess a monopoly in local telephone markets in virtually every state.

Broadband internet access is an unregulated competitive business. Providers of this form of access depend on the Bell companies for essential inputs and services, and the product that independent ISPs offer is complementary to the products offered by the Bell companies. That is, consumers of Internet access services also purchase other telephony products and services that are offered by the Bell companies. It is this interdependency between competitors and the local Bell monopolies that creates the issues that prompted Congress to impose the structural safeguards embodied in Section 272 of the Act. The safeguards are important because they are meant to prevent a local Bell monopoly from obtaining undue advantages when competing with the independent ISPs in providing information services. Such undue advantages potentially harm competition and consumer welfare.

The logic of Congress' intention is unassailable. If competition between ISPs takes place strictly on the merits, without undue advantages garnered by the Bell companies in offering their own information services, then the largest market shares will accrue to the competitors providing the best package of price, quality and service to the consumer. However, if the Bell companies are given undue advantages in offering their own ISP services, they can obtain market share at the expense of the independent ISPs even if they cannot provide superior prices, quality and service on an independent basis. Accordingly, without safeguards, efficient competitors and entrants will be excluded from the market or if not fully excluded, prevented from reaching minimum efficient scale. Confined to small market shares, the independent ISPs will be unable to capture efficiencies in production and marketing.

It has been suggested that subsidization of local Internet service by the Bell companies through bundling or cost sharing benefits consumers. This is only true in the short run. In the long run, the absence of structural safeguards will allow the Bell companies to expand their local monopolies into information services leading to premium pricing, and will lead to the destruction of more efficient companies, resulting in reductions in quality and innovation. In any event, there is no dispute that it was the clear intention of Congress in the Act that market forces should be the mechanism for creating consumer welfare rather than monopoly subsidies.

The problems requiring the structural safeguards are caused by the monopoly that the Bell companies continue to possess in local markets. The need for the structural safeguards is only eliminated once that monopoly disappears. Once local markets are subject to competition, the ability of the Bell companies to offer information services will no longer threaten competition. This is because the Bell companies will no longer be the exclusive provider of the inputs for local internet service or the sole supplier of other telephone products and services. In a

truly competitive local telephone market, any ISP will have the ability to procure any package of essential or ancillary telephone services from several sources at competitive prices. Once this is the case, there will no longer be a need for any restriction on the economic transactions between the Bell companies and their affiliates. Until that time, however, elimination of the structural safeguards poses grave competitive dangers.

II. INDEPENDENT ISPS CURRENTLY FACE NUMEROUS TYPES OF ANTICOMPETITIVE CONDUCT THAT WILL ONLY BE EXACERBATED IF THE STRUCTURAL SAFEGUARDS ARE LIFTED NOW.

The monopoly position of the Bell companies in local telephone markets not only presents the clear potentiality of anticompetitive conduct if the structural safeguards are lifted, but examples currently exist of such conduct even with the structural safeguards in place. The recent history of the independent ISPs indicates a need to strengthen enforcement of the existing safeguards rather than eliminating such safeguards.

1. Access to local facilities. Structural separation will remain critically important in preventing anti-competitive practices in the market for Internet access offered through DSL technology. For many independent ISPs, the Bell companies are the only choice of provider for DSL service. Very often, the Bell companies are the only provider of local loops, as well as the only avenue of access to the ATM network. The experience of the independent ISPs is one of inadequate and discriminatory treatment by the Bell companies in allowing the access to these essential network services.

The independent ISPs have complained on a number of occasions that Bell companies have used their monopoly in local facilities to thwart competition by delaying service to the ISPs. In Utah, for example, the roll-out of DSL in 1998 by US West evoked a complaint at the Utah Public Service Commission that US West had improperly packaged their MegaBit® service,

delayed installation of backhaul ATM circuits ordered by the independent ISPs, and provisioned uswest.net's own DSL subscribers ahead of earlier orders from ISP subscribers.¹ US West's conduct had the impact of significantly advantaging US West in the market for information services when the ISPs in Utah believe US West offers an inferior level of service. The experience of the ISPs in Kentucky was similar.²

The Bell companies have also leveraged their monopolies in local exchange services to bundle complementary services in a way that evidently subsidizes the Bell companies' unregulated internet service. The Bell companies often offer steep discounts on internet service if a customer buys call waiting, caller ID, premises equipment or a bundle of other services along with regulated local exchange service that independent ISPs cannot offer. The Petition of CIX and ITAA details Bell Atlantic's efforts to impede competition by bundling customer premises equipment and enhanced services in violation of Commission restrictions.³ Other Bell companies have engaged in the same kind of abuse. US West offers a \$75 rebate on installation

¹ *Informal Complaint of the Coalition of Utah Independent Internet Service Providers*, Docket No. 98-049-T17, filed May 13, 1998. According to the complaint, at least one Utah ISP waited for over one month for US West to complete the ISP's connection to the ATM network after the request for connection had been made and after the ISP had delivered a DS-3 to the US West connection point. In the meantime, US West apparently had no trouble connecting its own ISP service to the ATM network and began offering service during the interim. This informal complaint was never escalated to a formal complaint because Utah's statutes provided that the only remedy was for US West withdraw DSL from the tariff, an unacceptable result for ISPs who already had long term contracts to purchase ATM circuits, and for their customers who already had DSL service.

² *IgLou Internet Services, Inc. v. BellSouth Telecommunications, Inc.*, Docket No. 99-484 (Ky. Pub. Serv. Comm'n, filed Nov. 12, 1999)(Complaint at 5)(even after BellSouth began offering DSL service, it "continued to withhold necessary deployment information" giving it "an unreasonable advantage in the deployment of ADSL technology to Kentucky consumers.")(Complaint is pending as of the date of this Summary of Ex Parte Presentation).

³ See Petition of CIX at 10, citing 1998 *Biennial Regulatory Review--Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 98-183, *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 21531 (1998).

fees and a free DSL modem for its MegaBit®DSL Internet service. BellSouth in Kentucky offers its Complete Choice® service which offers a package of enhanced services and a \$15 cash back refund, but only to customers of BellSouth.net. For customers who also purchase BellSouth's DSL Internet access service along with the Complete Choice® package, BellSouth offers an additional discount on DSL service. Customers of other ISPs are not even eligible for the Complete Choice® package. In Florida, the Complete Choice® package offers residential customers Internet access for \$15 per month, discounted DSL, consolidated billing and a \$5 discount on the bill. Even the most efficient independent ISPs cannot compete with these pricing tactics.⁴ Through such discriminatory practices, Bell South has succeeded in dominating the information services market in its region.⁵

The Bell companies' lower prices for Internet service may appear to be advantageous to customers in the short run, but are ultimately harmful to consumers if the lower prices are not due to any efficiency achieved by the Bell companies. In the case of bundling intraLATA Internet services with regulated services, it is clear from the examples cited above that non-structural safeguards alone are inadequate to prevent predatory pricing or undue advantages due

⁴ See, e.g., *IgLou Internet Services, Inc. v. BellSouth Telecommunications, Inc.*, Docket 99-484 (Ky. Pub. Serv. Comm'n). In its answer to IgLou's complaint, BellSouth claimed that it is able to offer its customers a rebate, discount its DSL, cover the cost of contract services from its affiliate BellSouth.net, as well as all other direct costs, and a portion of common and shared costs all from its unregulated operations. *IgLou*, (Answer of BST at ¶¶ 13,16); see also, *In re Complaint against promotional practices of Bell South Telecommunications, Inc.*, Docket No. 990970-TP (Fla. Pub. Serv. Comm'n, filed July 27, 1999)(Complaint at 5)(alleging BellSouth offered anti-competitive prices by packaging Internet service with regulated services). This complaint was voluntarily withdrawn upon the recommendation of Florida PSC staff who concluded that that the BellSouth offer did not violate state law. Thus, while it has not yet been proven that subsidization takes place, the independent ISPs have not been able to compete with these offers.

⁵ *IgLou v. BellSouth*, Docket No. 99-484, (Ky. Pub. Serv. Comm'n). BellSouth will increase the number of its information services customers by 120% over the next year. (Answer of BST at paragraph 5).

to the Bell company's control of local telecommunications facilities.

The structural separation provision of Section 272 requires a Bell company's affiliated advanced services provider to conduct all transactions with a Bell company "on an arm's length basis with any such transactions reduced to writing and available for public inspection." 47 U.S.C. § 272(b)(5). The non-structural safeguards do not allow public scrutiny of any potentially harmful transactions and only ensure that such practices will continue, hidden from public view.⁶ The Bell companies will continue to gain market share in Internet services. To level the playing field, access to the Bell companies' regulated products and services must be no better for the Bell companies than for the independent ISPs. This can only happen if the structural safeguards are enforced, or local markets are pried open.

2. Access to Bell company network or customer information. Access to competitive information is one of the most critical areas in which the structural safeguards are needed to protect competition. With the recent deployment of high-speed access service, it has become increasingly important for independent ISPs who are capable of accommodating DSL subscribers to market their internet services to potential DSL customers. Even in areas where DSL is available, some customers are ineligible for service because of the length or condition of their local loop. Only the Bell companies know which customers are eligible and which are not. As a result, the Bell companies control the information necessary to efficiently market high-speed Internet access services. They know what central offices are provisioned, where the available DSLAM ports are, and which end users are loop qualified to receive DSL. With this information, the Bell companies can target specific areas or even specific customers for

marketing DSL and internet service packages. Typically, independent ISP's who desire to know whether potential subscribers are loop-qualified may submit their telephone numbers to the Bell company who will inform them, one at a time, at the leisure of the Bell company, whether the customer is qualified. Efficient marketing is impossible.

The Bell companies acknowledge obligation to disclose information about their networks to their enhanced services competitors, both in order "to enable those competitors to develop compatible enhanced services," and to prevent the Bells from using network information "to market enhanced services to their competitors' customers."⁷ Current information disclosure practices do not allow independent ISPs to market enhanced services in parity with the Bell companies. The asymmetric information available to Bell affiliates will increase if structural safeguards are not required.⁸

3. Customer contact, billing and collection. Control over the local network also gives the Bell companies greater customer contact and advantages in billing and collections. The Bell companies exploit these advantages to suppress competition in internet services. The independent ISPs frequent experience is that their customers who call the Bell company for the phone line portion of DSL service are greeted with offerings of special Internet packages and

⁶ In the company of the FCC's Enforcement Bureau, the CUIISP made repeated requests of US West for information about the provisioning process for end-user DSL circuits. US West has never produced any useful information in response.

⁷ Report and Order in the matters of: *Amendment of Sections 64.702 of the Commission's Rules and Regulations (3rd computer inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols Under Section 64.702 of the Commissions Rules and Regulations*, cc Docket No. 85229 at ¶¶ 246, 258.

⁸ See *Id.* at ¶¶ 260-265. The non-structural safeguards as currently applied, have failed to prevent anti-competitive practices in marketing. Structural separation should be required so that the Bell company's ISP cannot obtain information about its provision of exchange access without making the same information available on the same terms to independent ISPs.

prices.⁹ This customer contact occurs for no reason other than the Bell companies' control of the local loop.¹⁰ As a concession, some Bell companies have allowed ISPs to obtain authorization from their subscribers to order DSL from the Bell company on the subscribers' behalf. However, in areas where there are no competitive DSL providers, independent ISPs are forced to go to the Bell company for service provisioning, often with disastrous results for their own subscribers. The experience of the independent ISPs has been that orders are lost or delayed, installation of customer premises equipment is bungled or subscribers are slammed to the Bell company's ISP. Slammed customers have been permanently lost to the Bell's ISP. By contrast, customers who order DSL along with the Bell affiliate Internet services not only get a lower price for the package but, in the experience of the independent ISPs, they usually receive better and faster service.¹¹ These problems are a direct result of the lack of separation between the monopoly Bell company and its competitive information services. Removing structural separation requirements will exacerbate the problem and allow this conduct to go on undetected.

Some Bell companies bundle billing services in their package of local exchange and Internet access services.¹² For customers of those Bell companies, Internet service is billed on the local telephone bill. If the cost of the billing service is not treated as an arms-length

⁹ *IgLou v. BellSouth*, Docket No. 99-484, (Ky. Pub. Serv. Comm'n)(Complaint at 5); *Coalition of Utah Independent Internet Service Providers v. US West Communications, Inc.*, (Ut. Pub. Serv. Comm'n, 1998)(Complaint at 3).

¹⁰ Even in areas where there is more than one provider of DSL, it is not economically feasible for an ISP to use more than one provider. For each provider, the ISP must purchase separate DS-1 or DS-3 circuits to the DSL provider's point of presence.

¹¹ Although a number of USISPA members have reported these instances of discrimination by the Bell companies to the USISPA, only a few have commenced formal proceedings against their local Bell company. As a practical matter, litigation by individual ISPs at a state or federal level is often prohibitively expensive and may not yield favorable a result due to state laws that are protective of the Bell monopolies.

¹² *In re BellSouth*, Docket No. 990970-TP, Complaint at 5.

transaction, the Bell company's ISP gains a competitive advantage over an independent ISPs who must cover the cost of their own billing. Billing also provides an opportunity for the Bell company to insert with the bill a flyer advertising its Internet services. Accounting separations are not an adequate remedy for the competitive danger posed by the mingling of regulated and non-regulated services in the same package. The allocation of costs to regulated or non-regulated activities often involves the exercise of the Bell companies' arbitrary judgment, and they have strong incentives to develop protocols that disguise or misassign the costs of unregulated services. Moreover, effective oversight of cost allocation requires expensive participation in state proceedings that raise rivals' costs to the advantage of the Bell companies.

III. STRUCTURAL SEPARATION IS NECESSARY BECAUSE THE INCENTIVE TO DISCRIMINATE WILL INCREASE AS BELL COMPANIES ARE ALLOWED TO ENTER THE INTERLATA INFORMATION SERVICES MARKET.

Many Bell companies are currently offering only intraLATA information services and using a global service provider to carry traffic outside of their area. In this way, they are able to offer Internet service directly, without using a separate affiliate. It is in this context that they have developed anticompetitive tactics with respect to provisioning high speed access and in marketing Internet services. Part 64 accounting rules and the non-structural safeguards under which the Bell companies now operate for intraLATA service have done little to stem the tide of anticompetitive abuse.

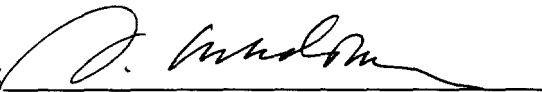
If the Bell companies are allowed to enter the interLATA market without structural separation, the problem will not only continue, but it will grow worse. This is because the incentives to exclude independent ISPs will increase. Prior to the sunset date, the Bell company would only receive the contribution margin on local service from a customer stolen from an

independent ISP. If allowed to enter the market for interLATA services, that same customer would represent both the contribution margin on intraLATA and interLATA service. For that reason, the incentive to engage in the type of conduct described above will become more intense.

The ISPs recognize that the ultimate remedy for the anti-competitive conduct they face from the Bell companies is the opening of competition in local markets. In the absence of such competition, the structural safeguards are at least a mitigating force and provide additional incentives to the Bell companies to relinquish their monopoly control. For this reason, Congress wisely included a provision in the Act allowing the Commission to extend the sunset date of Section 272. We encourage the Commission to do so.

DATED this 27th day of January, 2000

Respectfully submitted,

By: 

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